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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 2, 1993

By Hand

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

NOTICE OF EX PARTE PRESENTATION

Re: In the Matter of Rate Regulation for Cable Television; MM Docket 92-266

Dear Mr. Caton:

Please be advised that on November 8, 1993, a meeting was held between Matthew York, Publisher and Editor of *Videomaker Magazine*, and Bruce Romano and Karen Kosar of the Commission's staff. The purpose of the meeting was to disucss the Commission's rules on rate regulation for leased access on cable television. *Videomaker Magazine* has filed comments in this docket providing recommendations on how the Commission's rules should be improved in order to effectively comply with the 1992 Cable Act.

A summary of the issues that Mr. York disucssed with Mr. Romano and Ms. Kosar is enclosed. In his role as Publisher and Editor of *Vidoemaker Magazine*, Mr. York is uniquely positioned to be aware of the views of leased access subscribers and potential leased access subscribers throughout the nation. Through this position, it has become clear that, as presently written, the Commission's leased access rules will not provide a "genuine outlet" for programming "to assure the widest possible diversity of information sources," as Congress has required. We respectfully request, therefore, that the Commission provide special attention to Mr. York's recommendations on how the leased access rules can be improved.

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Should you have any questions about these issues, please contact the undersigned. In addtion, please feel free to contact Mr. York directly at (916) 891-8443 to discuss these issues further.

Sincerely,

David B. Jeppsen
Counsel for
Videomaker Magazine, Inc.

Enclosure

cc: Bruce A. Romano
Karen A. Kosar

DBJ/hlh

The FCC has lowered the maximum rates allowable for open leasing of cable time, but the rates remain too high to achieve the desired effect. The intent of Congress in the 1992 Cable Act was clearly to provide a "genuine outlet" for programs "to assure that the widest possible diversity of information sources." The FCC must drop the rate ceiling still lower if it is to achieve this goal.

The FCC divided all possible programs into three categories, pay-per-view, direct sales and "all other". The commission said further that a cable operator may not lease time for a given program or channel for more than the *highest* implicit value it receives from its other channels of the same type. If a non-affiliated producer, for example, wants to lease time for a pay-per-view program about bowling, the cable operator could charge him as much as the implicit value he gets from a pay-per-view heavyweight boxing tournament.

No-one would ever see the bowling show. The cable operator will price it out of the market. Though the current rules allow the bowling producer to negotiate with the operator for lower rates, the typical operator has no incentive for negotiation. He would typically rather air a pay-per-view program developed by his parent corporation than the competing work of an independent. He will therefore lease his channel time to outsiders at the highest allowable rate. This is legal under the current rules, but it does not satisfy Congress' mandate.

Rather than setting the ceiling with the highest programmer per category the FCC should set it with the *average* implicit value per category. This has a better chance of fostering the new programmers Congress sought to encourage. Some would even argue that the ceiling should be set with the production of the *lowest* implicit value in the category to give new producers the greatest competitive opportunity.

Pay-per-view Programming

This category would have a great deal of promise if the rates were lower. Pay-per-view entrepreneurs could totally avoid the sale of advertising. They could also reduce their reliance on advertising by generating at least some of their revenue directly from the viewers.

Rates for pay-per-view or premium programming or are far too high. If the highest implicit rates are based upon a boxing event, leased access for this type of programming would cost as much as four times that of programming in the "all other" category. The rates for this category should be based instead upon the "average" implicit rates that a cable operator receives over a month's time. Rather than basing rates upon a single two hour boxing event at $40, the cable operator should average the rates for an entire month of all his pay-per-view programming and then calculate rates upon those findings.

Transaction processing is another trouble spot. The 1992 Cable Act requires the cable operators to provide this service, but the rates that they charge for these services are unregulated. Given the historical resistance the cable industry has displayed in the category of leased access, it is unlikely that they will create rates that will allow an entrepreneur to succeed.

The cable act does require, however, that the cable operator provide an interface to a third party billing & collection service. It seems likely that a company will emerge to fill this need. There will be a demand for this service if the prices are right both for channel time and transaction processing.

Direct Sales Programming

The direct sales category is not one that needs regulatory intervention in order to stimulate it. The number of infomercials and the number of unaffiliated producers is quite high. The diversity in this category is certainly satisfactory, as anyone who watches late night TV will attest. Home shopping services, which are also in this category are abundant. In fact the FCC recently requested comments on the over-commercialization of TV. The regulations for this category should be to restrain it from flooding the entire supply of leased access channels. The infomercial industry has experienced enormous growth in the past 8 years. It is now a multi- million dollar industry.

The Commission is currently reconsidering the calculation methodology for direct sales programming. If the FCC chooses to interpret the formula in such a way that time for direct sales programs is priced the same as time for the "all other" category it risks increasing the commercialization of TV and decreasing access for diverse programming of other types.

All Other Programming

Channel and Time Location

Additional areas that need clarification are the location of the leased access channels. Since the tier location of leased access is unregulated, cable operators may relegate leased access to never- never land (a tier that very few customer subscribe to). The basic tier gives the lessee the maximum exposure to the market; if the new programs are to have a decent chance of success, that is where the leased access channels should be.

The requested time slot of the program is another location problem. Some uncooperative cable operators are offering time slots during very undesirable hours, the very-late-night "graveyard." The cable act is vague here, but it seems to require the cable operator to treat non-affiliated programmers the same as those affiliated. If, for example, the Viacom-affiliated MTV program requests basic tier from a Viacom operator, the operator would certainly provide a basic tier channel for it.

Similarly, no Viacom system has ever cablecast an MTV program in a time slot other than the time slot that MTV requested. MTV controls the hours of the day that its programs are transmitted, simply by feeding them to the cable operator via satellite. The cable operator transmits simultaneous with its MTV reception.

The FCC should specifically require such treatment for leased access programmers if they would give them the best chance at success.

Availability of Prime Time

Part time users face another challenge: how to air their programs during "prime time." Imagine an operator who starts leasing time on a single channel. Independent producers quickly lease all the "prime time." New independents follow, also requesting prime time. What should the operator do? Some operators are proposing that he should be allowed to ignore these latter requests, and simply schedule the programs during available time on the one channel he is leasing. This clearly would create a disadvantage for the late-comers, but it would also imply that the cable operator has not truly "set aside" channels for this use as the 1992 Act requires.

Again, let's use the affiliate treatment comparison. If a Viacom system had 4 open channels and MTV wanted a prime time slot and Nickelodeon wanted a prime time slot, you can be sure that the cable operator would give both affiliates what they requested. It would mean opening two channels during prime time only instead of one channel for a full day. Similarly, the operator should open new leased access channels up to the maximum required simply to provide as many producers with prime time as request it.

If the set-aside channels are truly set-aside, then the cable operator has "open" channels. The operator's own use of these channels while no lessee's are using them is a privilege, not a right. If they are to lease delivery capacity, just like a telephone company would, then those channels belong to the market, not to the cable operator. Since leased access has been a failure since its inception 8 years ago (either because cable operators have managed to stymie it or a market hasn't developed) then why create rulings that may hamper the development of this "genuine outlet"?

It seems doubtful that this category will become so popular that the cable operators would be concerned with a minor detail like this. It's not time to make a one-channel-at-a-time rule. Let's not solve a problem that may never materialize.

Third Party Billing Services

In the not so distant future additional issues will arise. Given the history of the Commission's reluctance to regulate telephone billing and collection rates, it is unlikely that the Commission will regulate the rates for billing and collection for leased access. Like the phone company 900 number industry, a new industry will emerge for third party billing in leased access. The players in this industry will need access to the computer memory in the set-top cable box so that their software can execute functions required for billing and collection. The address-abilty of the set top box and the control over the scrambling and unscrambling (encryption switch) are also areas that the players in this new industry will need access to.

Listing and Retrieval Systems

Lastly, once the 500 channel universe arrives, the consumer will need easy-to-use systems for getting program listings and retrieving the programs (e.g. setting VCRs, ordering pay-per-view shows or watching real-time during broadcast). Some refer to such systems as navigation systems for the information highway.

The navigation systems could become a bottleneck. If TCI owns a navigation system it could elect to omit channels or programs that it doesn't directly profit from. Rather than omitting listings, it may choose to list the programs of lessees in areas of the navigational software equivalent to "the back forty" or no man's land. This would be like assigning the highest numbered (least watched) channels to leased access: a common practice among operators today. It will become critical for this bias to be eliminated. When a TV set is turned on, the first screen (the boot up screen) should provide an easy and objective path to any and *all* program offered on the system.

Although it was made clear, by the Commission, that they were not "attempting to comprehensively resolve all the issues" and that the rules are a starting point, I believe that the areas that I have presented here are in serious need of reconsideration if section 612 is to have a reasonable chance of achieving the Congressional goal of creating a "genuine outlet".